

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 16

Docket No. CH-3330-09-0712-X-1

**Stephen W. Gingery,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

February 10, 2012

Stephen W. Gingery, Macomb, Michigan, pro se.

Roland L. Bessette, Esquire, Detroit, Michigan, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for enforcement of the Board's decision finding that the agency's failure to consider him for the position of Accounting Technician violated [5 U.S.C. § 3304](#)(f)(1) and ordering the agency to reconstruct the selection process, giving consideration to the appellant and any other covered veteran who applied consistent with the statute. *Gingery v. Department of Veterans Affairs*, [114 M.S.P.R. 175](#) (2010). For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement.

BACKGROUND

¶2 In 2009, the agency issued simultaneous vacancy announcements for a GS 5/6 Accounting Technician position under its open competitive process and its merit promotion process. The agency accepted the appellant's application under both announcements, but it prepared a certificate of eligibles under the merit promotion process that included only the name of an internal candidate. Pursuant to an agency policy, an internal candidate was considered first and was selected without considering the appellant or any other external candidate. In the appellant's appeal, the Board held that the agency violated his rights under the Veterans Employment Opportunities Act of 1998 (VEOA) because it accepted applications from outside its workforce and was therefore required by [5 U.S.C. § 3304](#)(f)(1) to consider the applications of qualified veterans like the appellant. *Gingery*, [114 M.S.P.R. 175](#), ¶ 11.

¶3 The Board ordered the agency to reconstruct the selection process for the Accounting Technician position, giving consideration to the appellant and any other qualified preference eligible or veteran. *Id.*, ¶ 12. The agency responded to the Board's order by conducting a "hypothetical" reconstruction in which it concluded that, if the internal candidate had not been selected, it would have selected W.L. for the position -- another veteran and external candidate, who would have been on the certificate of eligibles with the appellant. *Gingery v. Department of Veterans Affairs*, MSPB Docket No. CH-3330-09-0712-I-1, Petition for Review File, Tab 6.

¶4 The appellant then filed his petition for enforcement of the Board's decision, contending that the agency's hypothetical reconstruction was flawed because it failed to show that W.L. actually applied for the position or was a preference eligible and because it failed to remove the internal candidate from the position. Compliance File (CF), Tab 1. After the administrative judge notified the agency of the Board's cases holding that a hypothetical reconstruction of the selection process does not meet the requirements of VEOA, the agency stated that

it would conduct a reconstruction in compliance with those requirements. CF, Tabs 6, 13. The agency removed the internal candidate from the position in question, interviewed the internal candidate and W.L., and attempted unsuccessfully to set up an interview with the appellant. CF, Tab 15, Exhibits 1-4. The agency again selected the internal candidate. *Id.*, Exhibit 7.

¶5 On November 10, 2010, the administrative judge issued a compliance decision recommending that the Board order the agency to reconstruct the selection process. She found that the appellant refused to be interviewed or to cooperate with the agency's efforts to reconstruct the selection process. CF, Tab 17 at 5. However, she noted the appellant's stated belief that the selection had already been made due to the agency representative's statement, made at a status conference prior to the agency taking any steps towards a legitimate reconstruction, that the internal candidate would be selected again. *Id.* at 4, 5. On this basis, she found that the agency had not shown that it had appropriately considered the appellant's application under a lawful process and recommended that the Board should order the agency to reconstruct the selection process in accordance with its June 16, 2010 Opinion and Order. *Id.* at 5.

¶6 The agency responded to this recommendation with evidence that, contrary to the appellant's assertions, W.L. had applied for the Accounting Technician position under the original vacancy announcement and was a preference eligible. Compliance Referral File (CRF), Tab 5, Subtabs A & G. The agency stated that it had removed the internal candidate from the position and conducted a second reconstruction in which it scheduled interviews with the internal candidate, W.L., and the appellant, noting that the appellant declined to be interviewed. *Id.* at 3, 8. The agency argued that its determination that it would have selected W.L. instead of the appellant complied with the Board's order and that it properly restored the internal candidate to the position. *Id.* at 3. The agency also contended that the administrative judge improperly relied on agency counsel's remarks to find preselection of the internal candidate since the counsel had no role in the

selection process and was merely stating the obvious. *Id.* at 6-7. The appellant continued to argue that the agency failed to show that W.L. was a preference eligible and had filed a complete and timely application for the Accounting Technician position. CRF, Tab 3 at 5. He also argued that neither W.L. nor the internal candidate met the minimum qualifications for the position. *Id.* at 6-10.

May 20, 2011 Board Order

¶7 In an Order issued on May 20, 2011 (“May 2011 Order”), the Board found that the agency had not provided sufficient information to determine whether its reconstruction process was proper. CRF, Tab 8 at 6. The agency failed: to show whether it considered the KSAs (knowledge, skills and abilities statements) of all three candidates; to identify the individuals who interviewed the internal candidate and W.L.; and to show whether W.L. filed a complete application and whether she was a veteran or preference eligible. *Id.* With respect to the KSAs, the Board noted that the agency must apply the same selection criteria to all applicants. *Id.* at 7. With respect to interviews of the applicants, the Board found that the appellant must be given an additional opportunity to be interviewed. However, should he decline to be interviewed, the agency could limit its consideration to his application and his KSAs to the extent that it relied on the KSAs of the other candidates. *Id.* With respect to the interviewers, the Board found that the agency must provide further information as to who conducted the interviews of the internal candidate and W.L. and that, if the appellant consents to an interview, the same interviewers should conduct it or the agency must insure the appellant is asked the same questions as those asked the internal candidate and W.L. *Id.* at 8.

¶8 The Board also addressed the appellant’s objections to the internal candidate and W.L. as proper candidates. The Board found no basis in section 3304(f) to support his apparent suggestion that the internal candidate was required to be a preference eligible veteran, noting that as long as the criteria applied in the reconstructed selection process was the same as that used in the

original selection process, the Board would not find a violation if the internal candidate remains the selectee. *Id.* at 8 n.8. With respect to W.L., the Board found that the agency needed to provide further evidence concerning the completeness of her application and her status as a preference eligible or veteran. *Id.* at 8-9. The Board rejected the appellant's contention that the agency could not introduce in a compliance proceeding additional evidence relating to the other candidates' qualifications. *Id.* at 9. In sum, the Board ordered the agency to: (1) provide a statement under oath regarding (a) the criteria used in the original selection process, (b) the names of the interviewers of the internal candidate and W.L., and (c) W.L.'s status as a preference eligible; (2) explain whether W.L.'s application was incomplete, as one record document shows, and, if so, whether it could be considered; (3) submit evidence that the agency provided the appellant an opportunity to be interviewed; and (4) submit a detailed statement from the selecting official as to the reasons for the agency's selection of its selectee. *Id.* at 10-11.

Responses to the Board's May 2011 Order

The Agency's Response

¶9 In response to the Board's order, the agency submitted sworn declarations of four individuals at the Detroit Veterans Administration Medical Center (VAMC) that provide the information required by the Board. CRF, Tab 9. Patricia Thompson, a Human Resources Specialist, stated that she was responsible for reviewing applications for the Accounting Technician position and that W.L. was a preference eligible veteran who submitted a complete application. *Id.* at 20-21. Appended to Ms. Thompson's declaration are W.L.'s resume and a list of candidates on which her name appears that shows her application was completed and included a DD-214 form indicating her disability was rated at 70%, thus supporting the statement on her resume that she was a 10-point preference eligible veteran. *Id.* at 22-24. Karen Thayer, also a Human

Resources Specialist, stated that W.L.'s application had been noted as "incomplete" on the USA Jobs website because the website did not allow applicants to upload certain documents, such as resumes and DD-214 forms, which were required to be submitted by mail or by hand. *Id.* at 25-26.

¶10 Sherry Kilgore, the Detroit VAMC Chief of Fiscal, stated in her declaration that she was the selecting official for the Accounting Technician position. *Id.* at 6. She stated that she initially selected the internal candidate for the position because she determined that the internal candidate "had sufficient background in her experience to meet the needs of the position" and that she "showed good communication skills during the interview process." *Id.* Ms. Kilgore stated that, pursuant to the Board's June 2010 order to reconstruct the selection process, the internal candidate was reassigned out of the Accounting Technician position. *Id.* at 6-7. She stated that she and Patricia Humfleet had originally interviewed the internal candidate, but that, since Ms. Humfleet was no longer employed by the agency, in the reconstructed process she conducted the interviews of W.L. and the appellant with Larry Carr, the Assistant Chief of Fiscal. *Id.* at 6-7. Ms. Kilgore stated that she was asked to make a hypothetical selection between W.L. and the appellant, who declined to be interviewed. *Id.* at 7. She determined that she would have selected W.L. because of her accounting-related experience, specifically her former employment as an accounting technician at another VA facility as well as her previous work at the Detroit VAMC. *Id.* W.L. "had the specific training and knowledge required of the position," and "was pleasant and showed good communications skills." *Id.* Ms. Kilgore stated that, pursuant to the Board's May 2011 Order, the appellant was interviewed using the identical questions asked of the internal candidate and W.L. and that he was considered for the Accounting Technician position. *Id.* at 7-8.

¶11 Mr. Carr in his declaration stated that he participated in the interview of the appellant and that the appellant was considered for the position. *Id.* at 9-10. The agency's response included a copy of Mr. Carr's notes concerning the

appellant's answers to the interview questions. *Id.* at 11-19. His notes include a question from the appellant about the basis of the selection and Ms. Kilgore's response that the agency looks at resumes and experience and decides who is the best fit for the position, using a rating system. *Id.* at 17.

The Appellant's Reply

¶12 In his reply, the appellant objected to the agency's failure to explicitly name the selectee in its response and to the adequacy of its statement of the criteria it used in making the selection. CRF, Tab 10 at 6. He objected to the agency's failure to justify the choice of Mr. Carr as an appropriate replacement for the internal candidate's interviewer who had left the agency, and he argued that the internal candidate should have been re-interviewed. *Id.* The appellant also argued that the interview questions violated merit systems principles and VEOA because most of the questions related to general abilities relative to successful job performance, rather than to specific tasks required by the position. *Id.* at 7, 16-18.

¶13 The appellant contended that the agency's evidence was insufficient to show W.L.'s preference eligible status or to establish that her application was timely. *Id.* at 7-9. He repeated his arguments, previously rejected by the Board, that the agency could not consider candidates who had not filed appeals and that it could not present additional evidence concerning the other candidates' abilities beyond what was presented in the merits phase of the appeal. *Id.* at 8, 11-15. Finally, he argued that VEOA required the agency to select him for the Accounting Technician position because his superior academic degrees and years of experience showed that the agency could not in good faith have selected the internal candidate or W.L. on the basis of their previous work experience at the Department of Veterans Affairs (DVA) and the Detroit VAMC. *Id.* at 22-23.

ANALYSIS

¶14 As the Board stated in its May 20, 2011 Order, the agency's violation of the appellant's VEOA rights by failing to consider his application entitles him to a lawful selection process, not to an appointment. CRF, Tab 8 at 4 (citing *Gonzales v. Department of Homeland Security*, [110 M.S.P.R. 567](#), ¶ 6 (2009)). In such a process, the agency must show that it applied the same criteria to the appellant's application that it applied to the other candidates. See *Wheeler v. Department of Defense*, [113 M.S.P.R. 376](#), ¶¶ 16-17 (2010). Here, the agency has shown that it interviewed the appellant using the same questions that were asked the internal candidate and W.L. The appellant objects that, because one of the two interviewers of the internal candidate was no longer employed by the agency, a different second interviewer questioned the appellant and W.L. However, this necessary change did not prevent the same criteria from being applied to these candidates, nor did it require, as the appellant contends, the re-interviewing of the internal candidate, where the questioners' notes of her previous interview were available and could be re-reviewed before a decision was made. Cf. *Wheeler*, [113 M.S.P.R. 376](#), ¶ 17 (awarding points based on prior performance ratings of internal candidates only did not violate the veteran appellant's right to compete under section 3304(f) where all external candidates, regardless of veteran status, were treated consistently).

¶15 The agency provided sufficient evidence to show that W.L. was a preference eligible veteran whose application was complete and that she was therefore properly considered. The appellant's reasons for asserting that W.L. may not be a veteran covered by section 3304(f) and that her application may have been untimely are not persuasive. Contrary to his assertions, the sworn declarations of the agency's Human Resources Specialists state that they reviewed W.L.'s application, and the list of status candidates prepared by one of them indicates that W.L. submitted the appropriate form to show that she was a preference eligible veteran. CRF, Tab 9 at 20-26. There is also documentary

evidence in the record that W.L.'s application was submitted February 12, 2009, and thus before the vacancy announcement closed on February 25, 2009. CRF, Tab 5, Subtab A; Initial Appeal File (IAF), Tab 8, Subtab 4. There is also no merit to the appellant's objections to the other two candidates' basic qualifications; both candidates met the qualification standards for Clerical and Administrative Support Positions at the GS-5 Level. IAF, Tab 25 at 3; CRF, Tab 5, Subtab H.

¶16 We also reject the appellant's challenge to the validity of the questions posed in the structured interviews of the candidates. He objects to the fact that the majority of the questions address general work skills or abilities relating to interaction with coworkers, professionalism, work ethic, problem solving and critical thinking, rather than skill at the specific tasks enumerated in the position description. CRF, Tab 10 at 17. We do not agree with the appellant's contention that these general abilities are properly characterized as not essential to successful performance in the job. *Id.* The appellant has presented no evidence that the questions were not relevant to the position or that the agency was required to ask questions that he believed were more specific to the duties of the position. The weight that such general qualities should be given in relation to the specific skills required by the particular job is a matter within the hiring agency's discretion. Moreover, as discussed below, the agency's selection criteria give considerable weight to familiarity with the specific agency practices that govern performance of the Accounting Technician position.

¶17 In her declaration, the selecting official identified the critical criteria for her initial selection of the internal candidate and for her hypothetical selection of W.L. over the appellant.* She mentions in both cases the ability to communicate

* The appellant objects that the agency does not clearly state which candidate it finally selected. However, the identity of the selectee does not matter. As discussed in the text, the agency's selection criteria support selecting either of the other candidates over

well that was observed in their interviews. However, she indicates that the decisive factor was their work background at the agency that gave them familiarity with the specific accounting system in use at the DVA and the Detroit VAMC. The appellant does not dispute that he lacks this experience, but contends that it was disingenuous of the agency to rely on this factor to outweigh what he believes are his superior qualifications. However, we cannot find that the agency could not reasonably place such value on this experience or that its failure to prefer the appellant's background shows that it did not give his application good faith consideration. *Cf. Villamarzo v. Environmental Protection Agency*, [92 M.S.P.R. 159](#), ¶ 5 (2002) (VEOA gives the Board no authority to review the merits of the agency's action beyond determining whether the action violated a law or regulation relating to veterans' preference). Thus, the appellant has failed to show that the agency's reconstructed selection process violated his right to compete under VEOA.

¶18 Accordingly, we find that the agency is in compliance with the Board's decision and DISMISS the petition for enforcement as moot. This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

the appellant, and which one it selected does not affect whether he has shown the agency failed to give his application appropriate consideration.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.